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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/743,577	03/12/2001	Herbert Schlachter	0147-0220P	5756
2292	7590	09/01/2004		
BIRCH STEWART KOLASCH & BIRCH PO BOX 747 FALLS CHURCH, VA 22040-0747				
EXAMINER GOLLAMUDI, SHARMILA S				
ART UNIT		PAPER NUMBER		
1616				

DATE MAILED: 09/01/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

34.

Advisory Action

Application No.

09/743,577

Applicant(s)

SCHLACHTER, HERBERT

Examiner

Sharmila S. Gollamudi

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--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 09 August 2004 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

PERIOD FOR REPLY [check either a) or b)]

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
- ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on _____. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☐ The proposed amendment(s) will not be entered because:
- (a) ☐ they raise new issues that would require further consideration and/or search (see NOTE below);
 - (b) ☐ they raise the issue of new matter (see Note below);
 - (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 - (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____

3. ☐ Applicant's reply has overcome the following rejection(s): _____.
4. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☒ The a) ☐ affidavit, b) ☐ exhibit, or c) ☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because: see attached sheet.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☐ For purposes of Appeal, the proposed amendment(s) a) ☐ will not be entered or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: _____

Claim(s) objected to: _____

Claim(s) rejected: _____

Claim(s) withdrawn from consideration: _____

8. ☐ The drawing correction filed on _____ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____
10. ☐ Other: _____

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Applicant argues that the prior art do not disclose at least one amino acid in pure form and thus the prior art does not teach the instant invention.

Firstly, the examiner points out that the recitation of "pure form" is given its broadest reasonable interpretation since this term is not defined by the specification. The term pure means that the amino acids are not mixed with other substances or the term means that the amino acids are isolated from the source it is obtained. Therefore, applicant present scope does not exclude peptides. The examiner suggests either listing the amino acids in a Markush group to overcome this rejection or amend the claims to read at least one individual amino acid.

For arguendo sake, even if one were to take into consideration applicant's assertion that "pure form" excludes peptides the examiner points out this term does not clearly exclude amino acid derivatives. Firstly, it should be noted that Hersh et al also teach selenomethione. Note examples. The examiner points to page 7 of instant specification wherein applicant states:

The preparation of the present invention can contain all known amino acids **and amino acid derivatives**. Preferred amino acids and amino acid derivatives are alanine, phenylalanine, cysteine, cystine, proline, tyrosine, serine, histidine, glycine, leucine, isoleucine, valine, tryptophan, arginine, lysine, asparagine and glutamine. Particularly cystine, cysteine, proline, serine, histidine, lysine, leucine, isoleucine, valine, tyrosine, arginine, lysine, asparagine and glutamine are used. Cystine, histidine, glycine, leucine, valine, arginine, lysine and glutamine are especially preferred. The D-form, DL-form and L-form of the amino acids can be used, whereby the L-form is preferred. Examples for amino acid derivatives are N-acetylated forms, e.g. N-acetyl-L-glutamine, N-acetyl-L-tyrosine and N-acetyl-DL-tryptophan. The amino acids and amino acid derivatives can be used solely or in the form of mixtures. The amount of amino acids and amino acid derivatives in the preparation of the present invention is preferably 0.1 to 40 percent by weight, more preferably 0.2 to 30 percent by weight, most preferably 0.2 to 15 percent by weight, based on the sum of all components in the preparation. **The amino acids and their derivatives are preferably added in a pure form.**

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The examiner particularly points to the last statement, the amino acids and their derivatives are preferably added in a pure form.” Therefore, it is clear that the term according to applicant’s specification is not meant to exclude amino acid derivatives. Thus the scope allows for amino acids and their derivatives and the rejections stand. As suggested, the applicant might consider listing the amino acids in a Markush group to overcome this interpretation of the claims.

In regards to applicant’s argument that claims are read in light of the specification, it is respectfully pointed out "that even though claims are read in light of the specification, limitations from the specification are not read in to the claims." See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

Lastly, applicant argues the selenomethione is not considered an “amino acid” to one of ordinary skill in the art. Thus, selenomethione is not considered an amino acid in free form. Again, it is pointed out that the scope of the claims allow for amino acids and their derivatives. “Free form” does not exclude derivatives as discussed above. Secondly, the examiner cites art of interest to rebut applicant’s argument that a skilled artisan does not consider selenomethione an amino acid derivative. US patent 6,090,414 is cited wherein the patent states, “the amino acid comprises selenomethione”. See claims 51, 68, 110. US patent 5,827,886 is cited wherein the patent states on column 12, lines 53-55 “Yeast extracts with mineral glycopeptides and amino acids such as selenomethione...”

Therefore, the rejections are maintained.

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Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Sharmila S. Gollamudi whose telephone number is 571-272-0614. The examiner can normally be reached on M-F (8:00-5:30), alternate Fridays off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Gary Kunz can be reached on 571-272-0887. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Sharmila S. Gollamudi
Examiner
Art Unit 1616

SSG

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